No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

IDAHO FIRST NATIONAL BANK,
Appellee

IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

CLEMONS, SKILES & GREEN
Counsel for Appellant
Res: Boise, Idaho

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JURISDICTIONAL STATEMENT

The plaintiff, The Idaho First National Bank, is a national banking association with its principal place of business at Boise, Idaho. The defendant, United Pacific Insurance Company, is a corporation organized under the laws of the State of Washington and licensed to do business in the State of Idaho.

Jurisdiction is based upon diversity of citizenship and that the amount in controversy exceeds $10,000.00 (Tr. Vol. 1, pp. 4-5, 11, 32), exclusive of interest and costs.

STATEMENT OF THE CASE

The nature of the case is fully covered by the pretrial order (Tr. Vol. 1, pp. 32-36) entered in the case prior to trial. However, Appellant has appealed only from the Judgment entered as to Count I of the complaint.

The action was instituted by Appellee (also cross-appellant) under the terms of a banker's blanket bond issued by Appellant to Appellee. Count I of the complaint alleges that Appellee suffered loss of property in the amount of $10,494.70 due to the cashing of certain sight drafts executed by Gem Creamery Company, and that the loss was one caused by false pretenses and therefore covered by the provisions of Clause (B) of the Bankers Blanket Bond, Standard Form No. 24, which covered:

"any loss of property through * * *
theft, false pretenses * * *."

Under a Rider (Tr. Vol. 1, p. 14, plaintiff's Exhibit 4 and defendant's Exhibit 5) insuring Clause (D) was deleted, thereby deleting:

"any loss through forgery or alteration
of, on or in any checks, drafts * * *"

Also the application for the bond excluded loss through forgery (Def. Ex. 5).

In Count I Appellee alleges (Tr. Vol. 1, pp. 5-6) on or about February 19 and 20, 1963, employees of Gem

Creamery Company presented certain instruments to the Broadway Office of the appellee bank, and on February 18, 19 and 20, 1963, employees of Gem Creamery Company, presented certain instruments to the Capital Office of the appellee bank (Tr. Vol. 1, p. 6) and that the instruments were cashed by the two offices of the bank.

The instruments so alleged by Appellee to have been cashed by the two branches of the appellee bank were all sight drafts (plaintiff's Exhibits 2, 2(a) - (m) and plaintiff's Exhibits 3, 3(a) - (sl) (Tr. Vol. 3), and were presented for payment but have not been honored.

The Gem Creamery Company issued sight drafts and had an arrangement with the First Security Bank at Emmett, Idaho, whereby the drafts would be forwarded to the bank. At the end of the day the Bank would notify the Creamery of the drafts received that day. The Creamery would then pick up the drafts and issue a check in payment. (Testimony of Fischer, Vol. 2, Tr. pp. 24-26).

Drafts had been presented to, and accepted by, the two branch banks in question over a period of time by different employees of the Gem Creamery. On the dates in question, drafts were presented and were accepted by tellers of the bank. There were no questions asked, and no representations made, as to whether the drafts would be honored on presentment or whether any funds were on deposit, or held, to cover the same. The only interrogatory as to funds available to pay any draft at all was some 8 months before the dates in question. (Tr. Vol. 3, p. 9-10), (Tr. Vol. 2, pp. 95-97, testimony Barrett), (Tr. Vol. 3, pp. 9-12, testimony Cegnar), (Tr. Vol. 3, pp. 17-19, testimony Hoskins),

(Tr. Vol. 3, pp. 24-27, testimony Neuman), (Tr. Vol. 3, pp. 27-28).

Subsequent to the dates herein referred to, and the cashing of the drafts which are the subject of Count I, the Gem Creamery Company was forced into involuntary bankruptcy which was later consented to. (Tr. Vol. 3, p. 28).

SPECIFICATIONS OF ERROR

Appellant contends the court erred:

1. In admitting evidence (Tr. Vol. 2, pp. 49-50) (Tr. Vol. 2, pp. 57-58), as to cashing of drafts at business locations other than Appellee's and in entering Finding of Fact No. V.

2. In entering Finding of Fact No. VI in that it is not sustained by the evidence.

3. In entering Finding of Fact No. IX particularly as to the handling of the drafts as cash items.

4. In entering Finding of Fact No. X particularly as to the handling of the drafts as cash items.

5. In receiving evidence for (Tr. Vol. 2, pp. 57-58) and making and entering Finding of Fact No. XIV, which includes drafts presented at business locations other than Appellee's.

6. In entering Finding of Fact No. XVI in that it is contrary to the evidence.

7. In entering Findings of Fact numbers XVII, XVIII and XIX and thereby finding that false representations were made at the time of cashing of the drafts, which is contrary to the evidence.

8. In making and entering Conclusion of Law No. II.

9. In making and entering Conclusion of Law No. IV.

10. In making and entering Conclusion of Law No. V.

11. In not finding that there was no representation that funds were available for payment of such drafts, and the loss, if any, was through the acceptance of drafts which does not constitute false pretenses.

12. In not entering its Conclusion of Law that the issuance and acceptance of drafts, as shown by the evidence herein, does not constitute false pretenses.

13. In not finding that the sight drafts were in fact forgeries.

14. In not entering its Conclusion of Law that the sight drafts were forgeries.

15. In not finding in favor of Appellant on Count I of the Complaint.

16. In entering Judgment against Appellant on Count I.

SUMMARY AND STATEMENT OF QUESTIONS PRESENTED

Appellee contends that it suffered a loss of property by reason of cashing the drafts and that the loss is one caused by false pretenses. Appellant contends that if there was a loss: (1) it was not a loss caused by false pretenses, and (2) the drafts were in fact forgeries. (Tr. Vol. 1, pp. 33 and 34).

ARGUMENT

I

A DRAFT DOES NOT CONSTITUTE FALSE PRETENSES.

As stated in 11 Am. Jur. 2d, Bills and Notes, Section 14 at page 43, "A draft in the law of bills and notes is a 'drawing' and has been defined as an open letter of request from, and an order by, one person upon another to pay a sum of money therein mentioned to a third person on demand or at a future time therein specified." On the other hand, a check, as is stated in Section 16 of the same authority at page 45, is an order drawn upon a bank purporting to be drawn upon a deposit of funds. And at page 48, Section 18 of the same authority, it is stated that the characteristics of a check as distinguished from usual bills of exchange are that a check is payable instantly upon demand and not at a specified future time, and that a check is supposed to be drawn on a previous deposit of funds, while a draft is not.

The distinction is aptly explained in *Wilson v. Buchenau*, 43 F. Supp. 272:

> "A draft has been defined as an open letter of request from, and an order by, one person on another to pay a sum of money therein mentioned to a third person on demand or at a future time therein specified. * * * The two chief characteristics of checks are that they are drawn on a bank and are payable instantly on demand. * * * A check differs from a bill of exchange in that it is always drawn on a deposit while a bill is not. * * *"

Also drafts to be paid by a person, either upon demand or upon sight or upon presentment or notice should be distinguished from drafts between banks which are ordinarily placed in the same category as checks and predisposes a deposit of funds or an obligation to meet the demands of the bank.

The drafts involved herein were headed "General Draft," were payable at sight to the order of certain persons through the First Security Bank of Idaho and signed by an officer or partner of the Gem Creamery Company. Under the law of negotiable instruments, and in civil law, a draft is payable upon demand or upon presentment. However, a reasonable time for presentment is presumed so as to hold those secondarily liable. In other words, unlike a check, it is not a promise that funds are on hand but that if it is presented to the maker he will honor the draft. Presented to the Appellee bank in this case, the draft, on its face, only constituted authority to present to the Emmett bank for payment.

The complaint in this case seeks recovery under Clause (B) of the banker's blanket bond, standard form No. 24, which insures any loss of property through robbery, burglary, common law or statutory larceny, theft or false pretenses. Almost all of the authority as to the definition as to false pretenses occurs in criminal cases. However, the term "false pretenses" should not be so broadly construed in this case as it is in criminal cases. In criminal cases the person is answering for his own act, here the insurer is not. Here is a contract between the Appellant and Appellee, and there is no definition of the term. Under such circumstances we think it is universally held that the false pretense must relate to a present existing or to a past fact.

In *People v. Green*, 22 Cal. App. 45, 133 Pac. 334, where the court speaking about the necessary element of false pretense said:

> "Statutes of this character have been the subject of judicial construction throughout this country in a

great many cases; and the decisions of the court of last resort are in accord to the effect that in order to constitute a false pretense in law the misrepresentations must be of an existing or past fact, and cannot relate to the future, or be a mere promise to pay * * *"

Then after discussing parts of the evidence, the court in regard to the legal effect of a sight draft relied upon in that case, said:

"Respondent, referring to the sight drafts given by Green, Foster and Lehmann in payment of the goods obtained, requests that the character of these so-called sights be determined. The instrument set out in the indictment is in the following form: * * * It is, we think, apparent that this instrument purports to be nothing more than an order drawn by Green, Foster & Lehmann upon themselves for the payment of money, and cannot by any process of reasoning whatever constitute anything more than a promise by the maker to pay the sum therein named upon presentation. True it carries with it the implied representation of the ability of the drawer to do so; but what does that implied representation amount to? It amounts to a representation of future ability, for clearly some time was to elapse between the issuing of the draft and its presentation and payment, and thus comes within the class of representations as to future events which will not, according to the authorities, sustain a charge of the making of false pretenses.

"It is urged that the prosecuting witness parted with his property on the strength of the issuance to him of this sight draft. If so, he parted with it upon the strength of a promise to pay, in which respect

the transaction does not differ from the ordinary sale of goods, on credit, and the issuing of the drafts, as shown by all the circumstances of the case, was an arrangement adopted for the payment for the goods as purchased.

"The case of People v. Wasservogle, 77 Cal. 173, 19 Pac. 270, is not at variance with the views here expressed. In that case the passing of the draft was accompanied by the statement that the drawer had funds in the hands of the drawee with which it would be paid. The conviction was upheld upon this statement, which amounted to a representation of an existing fact. The court, however, expressly recognized the rule that a pretense must be of a past or existing fact."

The above cited case, People v. Green, is of interest here in Idaho in respect to the instant problem, particularly with respect to the fact that the pretense must relate to past or existing fact. The rule which has been followed in this state is expressed in *State v. Whitney*, 43 Idaho 745, 254 Pac. 525, as:

"* * * four things must concur, and four distinct averments must be proved: (1) there must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for that purpose; viz, they must be the cause which induced the owner to part with his property.

"The essence of the crime of obtaining money by false pretenses lies in obtaining the money with intent to defraud. A false pretense has been defined

to be a fraudulent representation of an existing or past fact by one who knows it not to be true, adapted to induce the person to whom it is made to part with something of value."

This same rule has been followed in this state in regard to prosecutions relating to checks, although the court in criminal actions has been inclined to construe evidence favorable to the prosecution, *State v. Larson*, 76 Idaho 528, 286 P. 2d 646, *State v. Eikelberger*, 72 Idaho 245, 239 P. 2d 1069, if there is any fact tending to show a false pretense of an existing fact.

But regardless of the criminal statute, we have here a contract between the two parties. The words false pretense certainly cannot be given a meaning of something promised to be done in the future.

It should be noted that all bank tellers testified that at the time of such cashing the drafts there was no conversation in regard to payment of the drafts or funds for such payment. (Tr. Vol. 3, pp. 10, 18-19, 25, 28). Apparently some 8 months before the drafts were cashed a Mr. Miller had authorized that drafts be accepted, there being no evidence as to any representation, even at that time, having been made to the Appellee as to the payment of the drafts (Tr. Vol. 3, pp. 11, 28).

On the other hand, the court admitted evidence that drafts had been cashed at other business locations (Tr. Vol. 2, testimony Hay, p. 49, etc., Drown, p. 56, etc., LeMaster, p. 63, etc.), although LeMaster testified that the only time he inquired as to the validity of the drafts was approximately six to eight months before the losses occurred (Tr. Vol. 2, p. 68), and that inquiry, as were any others, was made to the First Security Bank

at Emmett, Idaho. There is no evidence whatsoever that the makers or the payees of the drafts at any time made any pretense, false or true, as to the ability to make payment of the drafts, and particularly the drafts involved herein, nor is there evidence that inquiry was made as to Gem Creamery Company, the only inquiries apparently being made to First Security Bank.

II.

FORGERY BY MEANS OF FALSE INSTRUMENT

Forgery is not limited to the signing of another's name to an instrument. It may consist also of the signing of one's true name to a false instrument. In the instant case, we may treat the sight drafts as false instruments by reason of the fact that there were no funds to honor the same.

The case of Ex Parte Hibbs, 26 Fed. 421, may be considered upon both questions of whether a false draft is a forgery, rather than false pretense, and also whether forgery and counterfeit are one and the same.

In the Hibbs case, the defendant was Postmaster at Lewiston, Idaho. He made out postal money orders to a fictitious person at Pierce City, and converted the funds to his own use. The court held:

> "The crime defined in this statute is the common-law crime of forgery, with reference to the money order. To 'falsely make, forge, counterfeit, engrave or print' are all cognate terms used to define or designate the crime of forgery in some of its many phases. * * *
>
> * * *

"However, it is contended that a person cannot commit a forgery by making a false writing in his own name. But it must be borne in mind that forgery is not necessarily confined to the false writing of another's name. It may be, from the very nature of things, that it is more often than otherwise committed in that way; but both reason and authority say it may be committed in other ways * * *

* * *

"The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, * * * but in endeavoring to give an appearance of truth to a mere deceit and falsity * * *

"And if the deceit consist in making it appear that a man's own act was done under circumstances which would make it valid and genuine, when in fact it was false and unauthorized, the result is the same * * *"

And again at page 434 in the same case:

"It is not necessary to consider whether the prisoner committed forgery in writing the name of J. G. Wilson on the back of the three drafts on the Omaha bank. Forgery may be committed by thus writing the name of a fictitious person on an instrument. If the existence of such a person is a question of fact and not law, and the instrument appears to be valid on its face, the offense is complete, provided the act was done with intent to defraud. * * *"

It appears that the term "forgery" includes "counterfeiting." Thus in Quick Service Box Co. v. St. Paul Mercury Indemnity Co., 95 F. 2d. 15, it was said,

"Then, too, though one may under certain condi-

tions have authority to sign certain names, yet if he sign such to a false document or to an unauthorized one, it is forgery. Such was the conclusion of the court in Ex Parte Hibbs, D. C., 26 F. 421. The court commented that it must be borne in mind that forgery is not necessarily confined to the false writing of another's name. It may be committed in other ways. The essence of forgery does not so much consist of counterfeiting as in endeavoring to appearance of truth to a mere deceit and falsity * * *"

We think that the case of Peoples Bank & Trust Co. v. Fidelity & Casualty Co., 231 N. C. 510, 57 SE 2d. 809, 15 ALR 2d. 996, is authority upon all of the legal points involved here.

In that case, as here, the policy insured against loss through various causes, including false pretenses. A rider to the policy deleted Clause D, and thus withdrew from coverage any loss effected directly or indirectly by means of forgery.

In that case, one Otho Langley, who did not have an account at the bank, discovered that his signature would pass for that of another man who did have an account at the bank. On various occasions he would inquire as to "his" bank balance and cash checks.

To arrive at a definition of forgery, the court first examined the statutes denouncing certain acts as criminal acts described as forgery, and also the common law definition of forgery, the court said,

"From these definitions we find that the essentials to the completion of the offense are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy apparently capable of effecting a

fraud; (b) the fradulent intent 37 C.J.S. Forgery, Sec. 3 * * *

"False pretense and forgery are closely akin, both belonging historically to the family of offenses known to the common law as 'cheats,' and now so classed. False pretense is the heart of forgery—the essence of its being. The principal difference between the two, historically developed in the common law, is that forgery exclusively pertains to a writing, while false pretense covers fraudulent deceits by parol. Treatment of forgery as a separate offense came from recognition that a fraud perpetrated in altering a writing or making a false writing tends directly to destroy the security which permanent monuments in writing give to transactions affecting the more important rights of persons privy to them. It became a separate and grave offense; but the *gist* of forgery is still *fraud.* * * *

On page 816 of the S. E. Report, the court also said,

"* * * Under a policy which expressly rejects liability for any loss effected directly or indirectly by forgery it makes no difference which was the crime and which the adulterant."

Respectfully submitted

CLEMONS, SKILES & GREEN

By_____

Attorneys for appellant

CERTIFICATE

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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Receipt of three copies
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